



DATE ISSUED: March 21, 1989

CASE NO. 88-INA-325

IN THE MATTER OF THE APPLICATION
FOR AN ALIEN EMPLOYMENT CERTIFI-
CATION UNDER THE IMMIGRATION AND
NATIONALITY ACT

HUGHES AIRCRAFT COMPANY
(GROUND SYSTEMS GROUP)
Employer

on behalf of

MICHAEL SOSOPOULOS
Alien

Lynn A. Miyamoto, Esq.
For the Employer

BEFORE: Litt, Chief Judge; Brenner, Guill, Schoenfeld, Tureck,
and Williams, Administrative Law Judges

NAHUM LITT
Chief Judge

DECISION AND ORDER

This case arose from an application for labor certification submitted by the Employer on behalf of the Alien pursuant to Section 212(a)(14) of the Immigration and Nationality Act, 8 U.S.C. 1182(a)(14) (the Act). The Certifying Officer (CO) of the U.S. Department of Labor denied the application, and the Employer requested administrative- judicial review pursuant to 20 C.F.R. §656.26 (1988).¹

Under Section 212(a)(14) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that there are not sufficient workers who are able, willing, qualified and available at the

¹ All regulations cited in this decision are contained in Title 20 of the Code of Federal Regulations.

time of application for a visa and admission into the United States and at the place where the alien is to perform the work, and that the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must apply for labor certification pursuant to §656.21. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

This review of the denial of labor certification is based on the record upon which the denial was made, together with the request for review, as contained in an Appeal File (A 1-177), and any written arguments of the parties. 20 C.F.R. §656.27(c).

Statement of the Case

On September 12, 1986, the Employer filed an application for alien employment certification to enable the Alien to fill the position of test engineer. The duties included: implementing and up-dating all test procedures for production test, forward assembly test section; designing and acquiring test station/adaption as required by the test section and off load vendors; acting as focal points of management, control and maintenance of assigned projects; acting as interface between project management and supervisory staff; assisting in training test technicians; being responsible for budget control and bidding for new programs; maintaining individual manpower loading and accountings for each workday. A Bachelor of Science in Computer Science and one year of experience in the job offered was required. (A 47-77).

The Employer's recruitment efforts yielded two referrals, Henry Huynh, and Leonard Glick. (A 66-68). In a letter, dated February 6, 1987, the Employer stated that Mr. Huynh was rejected as unqualified. With regard to Mr. Glick, the Employer stated that "Mr. Glick has been employed by Hughes Aircraft and has since left the corporation. We would prefer not to comment on his suitability for the present position. (A 57).

The Certifying Officer issued a Notice of Findings on September 10, 1987, (A 45-46), in which he found that a U.S. worker, Leonard Glick, was rejected for other than lawful, job-related reasons under §656.21(j)(1), and that the Employer had not demonstrated that this applicant could not perform the basic job duties in a satisfactory manner through a combination of training or education, experience and special knowledge. Further, the CO found that the Employer had furnished a cryptic statement with regard to the U.S. worker's rejection, and that the Employer must be specific with regard to the rejection of each U.S. worker. (A 46).

In its rebuttal of August 10, 1987, the Employer stated that the U.S. worker voluntarily resigned from Hughes Aircraft Company in 1985, that he was an adequate worker, but had extremely poor communication skills. The Employer further stated that although the worker was "eligible" for rehire, the Employer preferred not to rehire him based on his poor communication skills. (A 43-44).

In his Final Determination issued October 30, 1987, the CO denied certification, (A 41-42), for failure to give lawful, job-related reasons for not hiring a U.S. worker, in violation of §656.21(j)(1). The stated reason of the Employer, that the applicant had poor communication skills, was found to be unconvincing. Further, the CO found that no evidence was presented to show that applicant's communication skills were so lacking that he was ineligible for the job opening. According to the CO, since the applicant had worked for the Employer for almost five years, it is unlikely he would have been retained for so long, if his communication skills were as poor as the Employer claims. Since no lawful, job-related reason for rejecting a U.S. applicant was presented, certification was denied. (A 42).

In its request for review, dated December 2, 1987, the Employer argued that the CO had misunderstood poor communication skills to mean language deficiencies; that what it was really referring to was that it has documentation that Mr. Glick submitted different resumes regarding his experience to Hughes for different positions. According to the Employer, Mr. Glick indicated on his resume for the position of senior systems engineer that he worked in the Displays Department; however, Mr. Glick indicated on his resume for the position of test engineer that he worked in the manufacturing division and test department. The Employer concluded that the Alien is qualified for the position and that the decision should be reversed. (A 1-3).

Discussion and Conclusion

In its request for review the Employer offered evidence to establish what it meant by poor communication skills. Although labelled as an explanation, what employer is really attempting to do is provide new evidence. As this board has said, the regulation §656.27(c) limits the Request for Review to legal argument and only such evidence as was in the record upon which the denial by the CO was based. The University of Texas at San Antonio, 88-INA-71 (May 9, 1988).

The CO based his denial of certification on the failure of employer to give lawful, job-related reasons for not hiring a U.S. worker in violation of §656.21(j)(1). He found employer's statement that the applicant had poor communicating skills to be unconvincing. The Employer, although it had ample opportunity, did not explain to the CO what it meant by "poor communication skills," or what relation poor communication skills bears to the performance of the job duties. This reason for rejecting an applicant is vague and indefinite, and is not one that lends itself to objective review. In R.L. Fender, D.D.S., P.C., 87 INA 657 (Feb. 3, 1988), we found that subjective concerns of this type do not constitute lawful, job-related reasons for rejecting an otherwise qualified U.S. applicant.

The Employer failed to provide lawful, job-related reasons for rejecting a U.S. applicant in violation of §656.21(j)(1). Accordingly, the CO properly denied certification.

ORDER

The Final Determination of the Certifying Officer denying labor certification is hereby
AFFIRMED.

NAHUM LITT
Chief Administrative Law Judge

NL:WB